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IN THE

Supreme Court of the United States

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the U. S. Court of Appeals, Fifth Circuit

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ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

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IN THE

Supreme Court of the United States

No._____

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the U. S. Court of Appeals, Fifth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners pray that writ of certiorari issue to review the judgment of the U. S. Court of Appeals, 5th Circuit at New Orleans, in the above cause affirming the judgment of the U. S. District Court for the Southern District of Texas, at Houston. The trial court entered its judgment on June 6, 1955 and filed findings of fact and conclusions of law under Rule 52 of Federal Rules of Civil Procedure (T.R. 673-682).

The U. S. Court of Appeals, 5th Circuit, affirmed the judgment of the trial court on May 15, 1956, which judgment was entered on said date. A copy of the opinion of the Court of Appeals and the judgment of said court are set forth in the appendix to this application.

Jurisdiction

The date of the order of the U. S. Court of appeals, 5th Circuit, denying petitioners' motion for rehearing in that court was June 26, 1956. A copy of petitioners' motion for rehearing and brief thereon appears in the record certified to by the Clerk of the U. S. Court of Appeals, 5th Circuit.

The jurisdiction of this court is invoked under 28 *U.S.C.A.* Sec. 1254(1).

Questions Presented

I.

Petitioners originally filed this suit in the District Court of Waller County, Texas. No service of process was had on the respondents. After six years, respondents voluntarily answered said suit and filed a cross-action for $17,500.00. Admittedly, they had a right to file a petition at said time to remove said suit to the Federal Court. They elected to invoke the jurisdiction of the State Court in which to litigate their cross-action.

Three years later, petitioners amended their complaint and for the first time set up a count in trespass to try title, and carried forward the original suit in its entirety. Respondents then filed a petition for removal, and after removal, petitioners filed a motion to remand, which was overruled.

It is petitioners' contention that under the applicable law (28 *U.S.C.A.* Sections 1441 and 1446), the right of removal from a state court to a federal court is peculiarly and only for a defendant who is involuntarily and against his will brought into the state court. Such right is not

for a cross-plaintiff who chooses the state court as the forum for his litigation by voluntarily filing a cross-action therein. It is petitioners' further contention that respondents, by voluntarily filing their cross-action for $17,500.00 in the District Court of Waller County, became plaintiffs in their turn, and invoked the jurisdiction of the state court to hear said claim. By not filing a petition for removal prior to the filing of their cross-action, respondents forever lost such right of removal.

II.

The petitioners' act in filing an amended complaint in the state court, including therein for the first time a count in trespass to try title to the lands in controversy along with their entire original cause of action, did not revive the respondents' right of removal from the state court to the federal court. It is petitioners' earnest contention that once having become plaintiffs by filing their cross-action for $17,500.00, the respondents, by not exercising the admitted right of removal to the federal court at said time, such right of removal was lost forever. The filing by the original plaintiffs of an amended petition setting up in part a new cause of action did not revive such right of removal, because such right is solely for defendants involuntarily brought into a state court. Such right is not for cross-plaintiffs who voluntarily invoke the jurisdiction of a state court to litigate their claims therein.

Federal Question Invoked

The construction of 28 *U. S. C. A.*, Sections 1441 and 1446, as applicable to the facts in this case present a federal question to be determined by this honorable court.

Statement of the Case

This suit originated in the District Court of Waller County, Texas, where it was filed on March 7, 1941 by Irene Smith Cliett, joined by her husband, J. M. Cliett, against Flora Scott, et al. This suit, as originally filed, was for the recovery of $6,084.08, representing money paid by the petitioner, Irene Smith Cliett, out of her separate funds on the purchase price, including payment on mortgage indebtedness of the property in controversy (about 700 acres of land), taxes paid by her on said property, and cost of necessary improvements, upkeep and maintenance (T.R. 26-38). The purpose of this suit was to determine the legal effect of a judgment rendered on March 14, 1938 by the U. S. District Court for the Southern District of Texas, at Houston, and affirmed by the U. S. Court of Appeals, 5th Circuit, in March, 1939, upon the question of the right of Irene Smith Cliett to recover for said money advanced for the purchase price and for the benefit of said property prior to March 14, 1938, which the judgment of the trial court did not attempt to adjudicate. (Reference is made to two opinions of the U. S. Court of Appeals, 84 Fed. 2d 489, 102 Fed. 2d 725.)

The following facts are uncontradicted:

1. That the petitioners in this cause are resident citizens of the State of Texas and all of the respondents are non-resident citizens.

2. At the time the respondents voluntarily filed their answer and cross-action on September 29, 1947, without ever having been served with process, there was more than $3000.00 in controversy, and said suit was accordingly removable at that time to the Federal Court.

3. The respondents did not attempt to remove the case to the Federal Court, but chose to answer fully to the merits and filed a cross-action against the petitioners for $7500.00 for alleged rents collected on the property in controversy, and $10,000.00 for use of the property in controversy by petitioners (T.R. 38-53), thereby invoking the jurisdiction of the state court to hear their cross-action.

4. On March 24, 1951, petitioners filed an amended petition adding to their original cause of action a count in trespass to try title to the same property described in their original petition, and in the alternative sued for a partition in the event it should be found, upon the trial of said case, that petitioners only owned an undivided one-half interest in said property. Petitioners carried forward their original cause of action in its entirety (T.R. 53-66).

5. The respondents timely filed petition for removal to the Federal Court (T.R. 21-26).

6. Petitioners timely filed a motion to remand the case to the State Court (T.R. 69-76).

7. The trial court, in a memorandum opinion, overruled said motion to remand and entered an order to that effect (T.R. 82-85). (See appendix)

The trial court held that petitioners' first amended petition stated in part a new cause of action, and that the case was removable to the Federal Court, notwithstanding that (a) the case was removable when respondents filed their original answer and cross-action on September 27, 1947; and notwithstanding that (b) the respondents voluntarily and without ever having been served with process and more than six years after the suit was filed, invoked the jurisdiction of the State Court for the prosecution of its own cause

of action against petitioners in the amount of $7500.00 for rents alleged to have been collected by petitioners, and $10,000.00 alleged to be owing the respondents by petitioners for use of respondents' land; and notwithstanding that (c) the respondents made no attempt to remove said suit to the Federal Court when they voluntarily and of their own free will filed their cross-action, thereby invoking the jurisdiction of the State Court for all purposes as actors and cross-plaintiffs.

The U. S. Court of Appeals, 5th Circuit, affirmed the judgment of the trial court.

Reasons for Granting the Writ

The precise point of law involved in this case is whether or not a non-resident defendant's right of removal from a state court to a Federal court is revived by plaintiffs' filing a new count in his cause of action after said defendant has invoked the jurisdiction of the state court by filing a cross-action therein and thereby becoming a plaintiff in his own turn. The determination of this federal question requires a proper construction of 28 *U. S. C. A.*, Sections 1441 and 1446. (See appendix)

This is an important point of federal law that has not been decided by this Honorable Court and that this Court should review the decision of the U. S. Court of Appeals for the 5th Circuit herein, and thereby settle this vital point.

Likewise, this exact point of federal law has never been adjudicated by a U. S. Court of Appeals prior to this decision. We submit the cases cited by the U. S. Court of Appeals for the 5th Circuit in support of its decision are not in point as we will hereinafter demonstrate.

We further submit that the construction placed upon 28 *U. S. C. A.*, Sections 1441 and 1446 by the U. S. Court of Appeals in this case is contrary to and in conflict with the construction placed upon said Statute by this Honorable Court in the following cases, which we will hereinafter demonstrate:

Charles W. West, et al. v. City of Aurora, 6 Wall. 139, 18 L.E. 819;
Merchants Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 27 Sup. Ct. 285, 51 L.E. 488;
Texas & Pacific Railway Co., et al. v. Eastin & Knox, et al., 214 U.S. 153, 29 Supreme Court 564, 53 L.E. 946.

It is obvious from reading the opinion of the U. S. Court of Appeals that said court made no distinction whatsoever between the defendant who *involuntarily* submits himself to the jurisdiction of a state court after service of process upon him, and a defendant who actually invokes the jurisdiction of the state court as the tribunal to litigate his own cause of action.

The decisions cited by the U. S. Court of Appeals, 5th Circuit, in support of its decision simply enunciates the well established principle of law that where a defendant is invountarily brought into a state court and files an answer therein, he is only answering the specific cause of action sued upon. Accordingly, should the plaintiff change or add to his cause of action, the defendant obviously has a right of removal. However, this is only true where the defendant has not filed a cross-action and thereby invokes the jurisdiction of the state court. None of the U. S. Court of Appeals cases cited pass on the effect of a defendant filing a cross-action prior to removal.

The cases cited by the Court of Appeals herein go no further than to hold that where a defendant submits himself to the jurisdiction of a state court by filing an answer, he has a right of removal if and when the plaintiff files a new and independent cause of action. To hold otherwise would work a grave injustice on a defendant, who, after service of process on him, files an answer submitting himself only to the cause of action sued upon.

This Honorable Court recognizes this vital and controlling distinction in the case of *Merchants Heat & Light Company v. James B. Clow & Sons* (Supra). Speaking through Mr. Justice Holmes, the Court said:

> "But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and, by invoking, submitted to it. It is true that the counterclaim seems to have arisen wholly out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in setoff proper. . . . *This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bringing another suit, not a necessity of the defense.*" (Italics is ours)
>
> "As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and to the extent of his claim, a cross plaintiff in the suit."

This important distinction was clearly recognized by this Honorable Court in the case of *Charles W. West, et al. v. The City of Aurora.* This Court, speaking through Mr. Chief Justice Chase, stated:

"The right of removal is given only to a defendant who has not submitted himself to that jurisdiction; not to an original plaintiff in a state court who, by resorting to that jurisdiction, has become liable under the state laws to a cross action.

"*And it is given only to a defendant who promptly avails himself of the right at the time of the appearance, by declining to plead and filing his petition for removal.* (Italics ours)

"In the case before us, West and Torrence, citizens of Ohio, voluntarily resorted, as plaintiffs, to the state court of Indiana. They were bound to know of what rights the defendants to their suit might avail themselves under the Code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants to a suit, removable on their application to the circuit court of the United States.

"A suit removable from a state court must be a suit regularly commenced by a citizen of the state in which the suit is brought, *by process served upon a defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the state court.*" (Italics ours)

Likewise, this important distinction was recognized by this Honorable Court in the case of *Texas & Pacific Railway Company v. Eastin.* This case holds that where a nonresident defendant invokes the jurisdiction of the state court for his own account and for his own purpose, he has no right of removal, and cites in support thereof *Merchants Heat & Light Company v. J. B. Clow & Son* (Supra). In this case, this Honorable Court, speaking through Justice McKenna, said:

> "It would be carrying too far the right of a party who has petitioned for removal of a case to extend it beyond what is necessary to defend against the cause of action asserted against him. He should not be permitted to invoke the jurisdiction for affirmative relief and deny it afterwards. It must be remembered how amply his right of removal is protected. He may file the record in the circuit court of the United States, and thereby completely take jurisdiction from the state court.
>
> "Judgment affirmed."

In this case we have the converse of the facts in the case of *Charles W. West, et al. v. The City of Aurora.* In that case, the plaintiff, a non-resident, filed a suit, and after a cross-action was filed against it, it wanted to remove the case to the federal court. Such removal was not permitted because the rule is only designed for defendants who have not invoked the jurisdiction of the state court.

In this case, the respondents, without having been served with process, filed a cross-action for $17,500.00 and thereby clearly invoked the jurisdiction of the state court for the purpose of litigating their claim. Such action on respondents' part constituted them plaintiffs within the purview of all three of the above mentioned cases rendered by this Honorable Court. Having become a plaintiff, the respondent had no right of removal.

We see no genuine distinction between the facts in the *West* case and in this case except that the litigation was started by the plaintiffs in the *West* case, whereas in this case, it was not begun by the defendants (respondents). In each case, right of removal was demanded by the party who

claiming affirmative relief in the state court. It was denied in the *West* case and should be denied in this case.

In this case, there is no question that the respondents invoked the jurisdiction of the state court for affirmative relief by filing their cross-action. *As held in the foregoing cases, respondents cannot invoke the jurisdiction of the state court for affirmative relief and deny it afterwards.*

The decision in this case cannot possibly be reconciled with the holdings of this Honorable Court in the above mentioned three cases.

Conclusion

This Honorable Court should grant this petition for Writ of Certiorari to the United States Court of Appeals, 5th Circuit, for the following reasons:

1. The exact point of law involved herein was never adjudicated by a U. S. Court of Appeals until the decision herein.
2. The precise question involved herein is one of federal law which has not been but should be settled by this Honorable Court.
3. In rendering the decision herein, the U. S. Court of Appeals, 5th Circuit, has decided a federal question in a way in conflict with applicable decisions of this Court hereinbefore cited.
4. The cases cited by the U. S. Court of Appeals, 5th Circuit, in support of its decision herein are not in point.

5. It is very vital to the jurisprudence of the United States that this Honorable Court determine the question of federal law involved herein.

WHEREFORE, PREMISES CONSIDERED, we pray that this petition for Writ of Certiorari be granted.

Respectfully submitted,

FRANK O. BARNES
SAM G. CROOM

By_____
Attorneys for Petitioners
619 San Jacinto Bldg.
Houston 2, Texas

A copy of the foregoing petition was mailed to counsel for respondents, W. H. Betts, Hempstead, Texas, on this the_____day of September, 1956.

_____
Attorneys for Petitioners

APPENDIX I

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15834

IRENE SMITH CLIETT and J. M. CLIETT,
Appellants and Appellees,
VERSUS
JEFF SCOTT, REED SCOTT, BERTHA SCOTT, and
MAMIE S. HAMMONDS,
Appellees and Appellants

(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Texas

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(May 15, 1956.)

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: Begun in the District Court of Waller County, Texas, on March 7, 1941 the

suit had for its object the recovery from the defendants, all non-residents of the State of Texas, of moneys paid by the plaintiff, Irene Smith Cliett, on account of the property described in the petition, consisting of about 700 acres of land.

Based upon a judgment, declaring that plaintiffs and defendants were joint owners of the property, rendered on March 14, 1938, by the United States District Court for the Southern District of Texas, and affirmed by this court in March, 1939, *Cliett v. Scott, et al.*, 102 F. 2d 725, the suit sought a judgment for the amounts claimed and a lien upon defendants' half interest in the property to secure their payment.

On September 29, 1947, over six years after the suit was filed, the defendants filed an answer to plaintiffs' suit, denying their claims and a counter claim which, acknowledging that the property was jointly owned, sought an accounting from plaintiffs for amounts due to them by plaintiffs for the use and occupation of the property.

On March 24, 1951, the plaintiffs filed a first amended petition. In and by it they sued in trespass to try title, claiming title by limitation to all the property in controversy, and in the alternative, only, reasserting their original claim for a money recovery.

Thereupon defendants filed their petition for removal, and the suit was removed into the United States District Court for the Southern District of Texas, the court in which the rights of the parties in the land had been earlier declared and established.

On April 24, 1951, plaintiffs filed their motion to remand on the ground that the defendants had voluntarily submitted to the jurisdiction of the state court and had lost their right to remove.

The district court, pointing out in a memorandum opinion that, though, by appearing and answering the original petition, the defendants did submit themselves to jurisdiction of the state court with respect to the claim asserted therein, the amended petition set up an entirely new and completely different claim, and defendants then became and were entitled to remove.

On Dec. 5, 1951, defendants filed a motion for summary judgment, and after being fully heard and argued, the motion was sustained and judgment entered for defendants as to the claim of plaintiffs that they had acquired title by limitation to the whole of the land.

In a carefully written and correctly argued opinion, the district judge took note of the previous litigation in the federal court, *Scott v. Smith*, 84 F. 2d 489 and *Cliett v. Scott*, 102 F. 2d 725, which had ended in a judgment vesting title in plaintiffs and defendants, one-half in each, and that, on March 7, 1941, plaintiffs, not claiming the lands as their own but as jointly owned with defendants, had filed, and for ten years had maintained, a suit for an accounting for moneys claimed to have been expended in the joint interest of the co-owners with a lien to be fixed on defendant's one-half interest in the land. Holding under Texas law, established in the host of cases cited by him, beginning with *Word v. Drouthett*, 44 Texas, 369, and concluding with *Delaney v. Padgett*, 193 Fed. 2d 807, that by thus admitting ownership of a half interest

with the defendants in the land plaintiffs were prevented from claiming that they had held the land adversely, he correctly held that the plaintiffs had not in the ten year period claimed by them acquired a limitation title against the defendants. Entering judgment accordingly, he reserved for further action the claims of the respective parties against each other for an accounting growing out of the use and possession of, and the improvements made and moneys expended, on and in respect of the land.

Thereafter, a full accounting having been had, the district judge, canvassing the respective contentions of the parties and fully appraising them, found and concluded that sums were due from each to each in amounts which in effect offset each other, and that neither plaintiffs nor defendants were entitled to a money judgment against the other. So concluding, he ordered a partition of the property, appointed commissioners to effect it, and taxed the costs one-half against each.

Appealing from the judgment, plaintiffs are here urging upon us that the decree must be reversed because it was error (1) not to remand the cause to the state court; (2) to determine on summary judgment and as matter of law that plaintiffs had not perfected title by limitation; and (3) to find in effect that the claims due plaintiffs by defendants were offset by the claims due defendants by plaintiffs.

On their part, defendants are here insisting that the judgment should be affirmed, except on their cross-appeal which alleges error in the accounting and seeks an affirmative judgment in their favor.

On the issue of remand, appellants' reliance is placed wholly in the fact, that the removal statute, Sec. 1441, Title 28 U.S.C., accords the right to remove to defendants only, and the claim that defendants, having not only submitted to the jurisdiction of the state court but having invoked its jurisdiction by becoming cross-plaintiffs, ceased to be defendants and became in effect plaintiffs.

The appellees' position is, and that of the district judge was, that while defendants did consent to the jurisdiction of the state court over the claim for accounting filed by plaintiffs, and did file a counter claim, either permissive or compulsory, this did not change or affect their status as defendants, and under settled law, when plaintiffs filed an entirely new and different suit, defendants' right to remove revived.

We think it clear that the position of appellee and the district judge is the correct one. While there is some confusion in the authorities as to the effect on removal of the filing of a cross action,[1] it is well settled that a claim of the kind filed in this case by the defendants against the original plaintiffs was not such an independent suit as to affect the right to remove, and the authorities are overwhelming that, though a defendant has submitted himself to state court jurisdiction on one cause of action, this does not prevent his removing the cause when an entirely new and different cause of action[2] is filed.

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[1] 45 Am. Jur., "Removal" Sec. 15, p. 817; Habermel v. Mong, 31 F (2) 822. Cf. Chicago, R.I. & P. v. Stude, 346 U.S. 574.

[2] Evans v. Dillingham, 43 Fed. 417; Mattoon v. Reynolds, 62 Fed. 417; Henderson, et al. v. Midwest Refining Co., 43 F (2) 23, 25; Baron v. Brown, 83 Fed. Supp. 520.

On the other issues raised, little need be said. We find ourselves in full agreement with the district judge on the issue of limitation. Indeed we think it is too clear on principle and on authority to admit of discussion that plaintiffs cannot after formally admitting in their pleadings filed in court that the defendants are co-tenants with them, later claim that during the period that such pleadings were on file their claim was adverse.

When finally we come to the judgment on accounting, with which both plaintiffs and defendants disagree, we think it clear: that the matters considered and determined, with their countervailing equities, were matters of equitable cognizance which, under the facts in this case, including the long prior litigation, the chancellor was peculiarly fitted to assay and determine; and that his conclusion, to leave the parties where the decision of the federal court in 1938 had left them, as co-tenants and as having completely offsetting rights against each other, was a wise and sound conclusion and should not be disturbed.

The judgment is, therefore, AFFIRMED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR.
Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX II

Judgment

Extract from the Minutes of May 15, 1956

No. 15834

IRENE SMITH CLIETT and J. M. CLIETT,
VERSUS
JEFF SCOTT, REED SCOTT, BERTHA SCOTT, and
MAMIE S. HAMMONDS,

(AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants and appellees, Irene Smith Cliett and J. M. Cliett, and the surety on their appeal bond herein, Columbia Casualty Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court; and that the appellees and appellants, Jeff Scott, Reed Scott, Bertha Scott, and Mamie S. Hammonds, and the surety on their appeal bond herein, Maryland Casualty Company, be condemned, in solido, to pay one-half of the costs of this cause in this Court, for all of which execution may be issued out of the said District Court.

APPENDIX III

Sec. 1441 of Title 28, U.S.C.A. reads as follows:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Not pertinent.

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937."

Sec. 1446 of Title 28, U.S.C.A., provides:

"1446. *Procedure for removal*

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

"(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

"(c) Not pertinent.

"(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

"(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State Court which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

"(f) Not pertinent."

APPENDIX IV

Memorandum Opinion of the Trial Court Dated June 1, 1951 Overruling Petitioners' Motion to Remand

"*Memorandum:*-

This suit has been removed by defendants into this Court from a State Court. Plaintiffs have moved to remand. This is a hearing of such motion to remand.

The facts shown by the record and my comment thereon are as follows:-

(a) Plaintiffs' Original Petition filed in the State Court shows diversity of citizenship between all Plaintiffs and all Defendants. That there is such diversity of citizenship is in effect admitted in Defendants' Petition for Removal.

(b) Plaintiffs' Original Petition filed in the State Court alleges and shows (Paragraphs II, IV, V, VI, and the Prayer) that the matter then in controversy exceeded the sum or value of $3000, exclusive of interest and costs—a case removable under the Statute. In determining removability, Courts look to the allegations of Plaintiffs' Petition in the State Court, and do not inquire whether such allegations made in good faith are true or untrue.

(c) While the case was pending on such Original Petition, Defendants did not see fit to remove the case, but answered to the merits, joining issue on Plaintiffs' allegations in each of said paragraphs. Defendants also by cross action sought to recover $17,500.00 from Plaintiffs as moneys collected by her, rents, profits received by her, etc. on the lands described in Plaintiffs' Original Petition. Defendants

thereby fully submitted themselves to the jurisdiction of the State Court on the causes of action stated in such Original Petition and Defendants' Cross Action.

(d) On March 24, 1951, Plaintiffs filed their Amended Petition in the State Court. Viewing such Amended Complaint, wholly or in part, as a new or different cause of action, and one removable to this Court, Defendants removed the case into this Court, and Plaintiffs' Motion to Remand followed.

An examination of such Amended Petition shows that plaintiffs in their *First Count* set up an *entirely new* cause of action, i.e., a suit in Trespass to Try Title under the Texas Statutes. Alleging diversity of citizenship, they sue the same Defendants (except that it is alleged that the husband of Mamie Hammond is deceased and that Flora Scott is not only the surviving wife but the Administratrix of George Scott, deceased) for title and possession of certain lands in Waller County, Texas, apparently the same land, wholly or in part described in their Original Petition. Plaintiffs allege that they own such land not only under a regular chain of title from and under the sovereignty of the soil but under the Texas Three, Five and Ten Year Statutes of Limitation. They say they have been ejected by defendants, to their damage $25,000.

In their *Second Count*, Plaintiffs say that if they own only a one-half interest in such land, they in the alternative set up a substantially similar cause of action to that asserted in their Original Petition, and in addition they pray for Partition of such land.

I - I conclude that the cause of action presented in Plaintiffs' Amended Petition presents a case which is new

in part and was and is removable. And that Defendants, by answering in the State Court Plaintiffs' Original Petition, did not waive their right to remove.

It follows that plaintiffs' Motion to Remand should be denied. Let Order be drawn and presented accordingly.

(s) T. M. KENNERLY
Judge

Office - Supreme Court, U.S.
FILED
OCT 19 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

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